

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 577 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.J.VAIDYA

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy
of the judgement? Yes

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to Cri.Courts? Yes
Immediately

STATE OF GUJ

Versus

BRAHMIN BABULAL HARIBHAI

Appearance:

Mr. B.D.DESAI, APP for Appellant.
MR. AJ SHASTRI, for Respondent No. 1

CORAM : MR.JUSTICE K.J.VAIDYA

Date of decision: 26/03/97

ORAL JUDGMENT :

What indeed is the duty of the learned Magistrate
trying the accused for the alleged offences punishable
under the Arms Act, 1959, when found in conscious and
intelligent possession of fire arms, more particularly in
the backdrop of the breath-taking scenario of ghastly

terrorism and bloody communal riots rocking the country taking innocent lives of the hundreds and thousands of citizens every year when befooled with the embarrassing pernicious situation where prosecution case entirely depends upon the evidence of the police officers and the panchas do not support the prosecution ? And further incidentally enough for that purpose once again more particularly at the initial stage of the investigation, what indeed is the duty of the learned Magistrate when the police requests him praying for remanding the accused to its custody with a view to complete the chain of investigation to find out (i) the very source from where indeed he obtained fire-arms ? for what consideration ? (iii) to whom he was to sale or transfer or in any other manner handover ? (iv) who were the other intermediary links in between him and the manufacturers of the fire arms ? which is always and invariably absolutely necessary being an essential and the integral part of the logical investigation in the overall interests of the 'law and order' and 'justice' in the State, in the country !! In highly inflammable and surcharged anti-national atmosphere, with enemy countries with evil eye and design quite near across the border with their underground fifth columnist activities and continuously trafficking in fire-arms is a situation no less risky, grave and dangerous than to allow in an unguarded moment small possible spark setting ablaze the village, town, district, State and even the entire Nation if the law enforcing agency and for that purpose even the courts also are found unnecessarily relaxed, over trusting, soft paddling and/or caught napping ! Under such hostile circumstances, is it indeed not the duty of each and every court to be quite alert and demonstrate judicial sensibility and awareness in dealing with the cases under the Arms and Explosive Act in place of quite care-free, unconcerned and unrealistic approach to the problem unlike the one evinced in the instant case ?. The reason is no judicial perspective can ever ultimately bring home the real and substantial justice if it is divorced of overall social well being, concern and perspective !! while doing justice, justice does not at all mean justice to the accused alone, it also very much includes justice to the society also . In sum and substance, the court is not merely to handle cases, it is also required to deliver justice duly understanding them in their proper perspective ! This ultimately depends upon judicial consciousness, awareness, patriotism, and all concern for the society !

2. To appreciate and understand the brief preface indexed above it is indeed necessary to refer here

synopsis of few relevant facts. Accordingly, to briefly narrate the prosecution case, as it gets unfolded from the evidence of p.w.4 Chandrakant Mehta, PSI, LCB, Porbandar, on 10.5.87 when he alongwith PI Deol, and the other staff personnel was on patrolling duty, at about 13.50 hours near Old light house, he saw one person, who on seeing the police started running and on suspicion, was detained. On being interrogated, he revealed his name as Brahmin Babulal Haribhai. On taking out search of his person, one country made 32 bore pistol in working condition was recovered from waist beneath his pent. This was seized in presence of two panchas, namely p.w. 1 Pratapgiri Amargiri and p.w. 2 Chana Laxman who ultimately did not support the prosecution (under panchnama produced at exh.7). When further inquired about licence for the said muddamal pistol, Brahmin Babulal Haribhai could not produce the same. Thereafter, p.w. 4 gave a complaint at exh. 13 at 15.30 hours. On further interrogation, the accused expressed his willingness to show other pistols which he had kept hidden under the sand at the Porbandar sea-cost. Thereafter, p.w. 4 Chandrakant Mehta alongwith PW-3 Manubhai Virabhai panch (hostile) went to the sea-coast where the accused took out two bundles containing one gun and five pistols hidden below the sand. All these fire-arms were in working condition and came to be seized under the panchnama exh. 10. On the basis of these facts, after obtaining necessary sanction exh. 16, the accused came to be charge-sheeted before the learned Judicial Magistrate, First Class, Porbandar to stand trial for the offences under section 25(1-B) of the Arms Act 1959, and section 135 of the Bombay Police Act, 1951.

3. At the trial, the accused pleaded not guilty and claimed to be tried. He not only did not lead any defence, but did not suggested any motive even against the police for falsely implicating him in serious charge under the Arms Act.

4. The trial Court after duly appreciating the prosecution evidence, acquitted the accused mainly on the ground that the panch witnesses did not support the prosecution. It is under these circumstances that the State has preferred the present appeal.

5. Heard learned APP Mr. B.D Desai and Mr. A.J. Shashtri appearing for the respondent-accused.

6. This Court at the very outset strongly disapproves of the mechanical and idle manner in which the learned Magistrate appreciated the evidence of the

police witnesses, while acquitting the accused alleged to have committed serious offence under the Arms Act, on the ground that the panch witnesses did not support the prosecution and police was proverbially interested witness, and accordingly, in absence of independent corroboration forthcoming on the record no order of conviction and sentence could ever be recorded against the accused ! This is indeed too general and cavalier an approach, more particularly when there is nothing in the cross-examination of the police witnesses, namely p.w. 4 Chandrakant Mehta and p.w.5 Shantilal Bhimji and p.w. 6 Krishnakant Shamji that they were in anyway and at any cost interested in falsely implicating an innocent man, from whom only fire-arm was recovered !! In fact, in a given case, the evidence of the Police officers even if they are not supported by the panch witnesses, can be safely accepted and relied upon in cases under the Arms Act itself is the decision of this Court rendered in the case of State of Gujarat vs. Ibrahim Shalu Koli reported in 35(1994) 1 GLR, 279. Nodoubt, this decision is quite later in time after the alleged offence ,but at the same time, the principle as to how the evidence of the police witness when not supported by the panch witness is recorded to be appreciated and accepted is quite too well known to be easily lost sight of . Not only this, but for that purpose, the evidence of the police officers in cases under the Corruption Act can as well be relied upon, there are several decisions of this court and Apex court also. It is but natural that in such serious cases like the one under the NDPS Act and the Arms Act, where a panch even if he is honest and truthful, would never dare, like to give evidence in the open court against the accused, who in all probability, obviously and always may be connected with some underground dreaded criminals, resulting into conviction and sentence which could ultimately easily boomerang upon him and his family members putting their lives, limbs and liberty in danger at any time, at any place for giving evidence implicating the accused !! Quite rightly so because in case if any such apprehended things happen, who is indeed going to protect, and save lives of such witnesses from being victimized by the convicted accused ! Under such tale-telling circumstances, the Court should not readily discard the evidence of the police witnesses, merely because it finds that the panch witnesses do not support the prosecution more particularly when there is no reason to doubt the credibility of the police officer who actually caught accused red-handed ! In these horrendous days of unprecedented recurring acts of terrorism in Punjab, Jammu & Kashmir, Assam, etc. (infact where not ?) and the blood-thirsty , devilish and anti-national

communalists taking hundreds and thousands of innocent lives every year at any time at any place anywhere in India, to treat accused actually found in possession or reasonably suspected of being connected with fire arms, casually is too serious a thing and quite an irresponsible approach of the court, rather crime against the Administration of Justice, and the society !!. Such an insensitive, insensible and casual approach by the court more often than not may unnecessarily put entire "Law and Order" situation in great peril with unpredictable dangerous fall-out consequences engulfing the country even !! The principle that when evidence of the police witness is not corroborated by independent witnesses, it can not be made basis for recording order of conviction and sentence is too general and broad principle to be mechanically resorted to and applied irrespective of bearing in mind otherwise credible, dependable evidence of the police witness, and/or other attending circumstances of the case. While applying any principle to the facts of the case, the court is required to apply its mind first. It is indeed required to closely scrutinize the evidence ! In this view of the matter, in serious cases like the present one where the question involved in over all public security is quite grave and serious and further in any other serious cases like the one under the NDPS Act etc.etc no court could ever be permitted to be an easy unconcerned armchair critic or dischanted technocrat or have the gullible child approach, having no concern, no anxiety whatsoever for the protection of social well-being. The lofty principles which fly high and above and move here and there are indeed quite good worthy to be adopted in appropriate cases, but if applied and practised without any earthly and common sense application then that has indeed no meaning !! It must have its feet, its touch and taste of the earth, the workability and accordingly the touch and taste of the judicial vision, wisdom, pragmatism anxiously evincing parental care for the Society !!. If found wanting in this regards, this is where the courts are also accountable to the society for their day-dreaming, blindly holding fast ivory tower philosophy focussing and favouring accused only forgetting altogether overall social interest involved ! We, as courts, are indeed bound to take a serious note of certain areas of our country where the uncontrolled terrorism has taken a heavy toll and is still taking heavy toll of many innocent lives or the riots taking place in big cities like Ahmedabad, Baroda and Surat where daggers /trigger-happy persons are readily made available draggers, fire-arms and for this purpose commercial and even free of cost trafficking in arms goes

in day in and day out in full swing quite clandestinely !. Incidentally, it is also reported that Pakistan is also smuggling in India fire-arms made by U.K., U.S.A., China etc. for distribution for further fanning disruptive forces in the country playing with the sovereignty and integrity of the country !!. At the the bottom and under current of this terrorism and terrorist activities who is that person ? Of course, ' ordinary looking carrier carrying forward and supplying fire-arms to the anti-national terrorist and communalists ? It is only these arms, persons like the accused in the present case under such unignorable hard facts and circumstances . In a case where a fire arm is found from the person of the accused, how such a man can ever be acquitted, and yet when such a person is found still acquitted, it clearly speaks about the bankruptcy or poverty of the judicial awareness and accountability of the turmoil situation prevailing in the State and the Country, more particularly in appropriate cases wherein there is no reason to doubt the testimony of the police officere that atones merits acceptance and reliance !!.

8. I make it clear that in the instant case, I am relying upon the evidence of the police officer because the muddamal was actually found from his person. Not only that, but two panch witnesses who have not supported the prosecution, in terms admitted their signatures on panchnama exh. 7 and 10. Under the circumstances, if we are to airily dismiss the evidence of the police officer against whom nothing is alleged, applying the general test of independent corroboration mechanically, the society will never be safe and live peacefully and if the society suffers because of terrorism, it could be the Court only b which is responsible because of such indiscreet acquittals. So far as the role of the concerned Magistrate/Judge is concerned, his role is no less responsible and important than the army defending the country. The enemy country may or may not attack, but when the internal terrorism has become the order of the day, it is the duty of the concerned court to be alert and aware of this challenging situation and should not lightly acquit the accused who are found in actual possession of the arms and ammunitions. These observations of the Court require to be taken a very serious note by all the Magistrates of the State, and to ignore it could be treated as 'gross misconduct' by the concerned Magistrate. This caution and emphasis is absolutely necessary in view of the overall anxiety and concern of this court as a Constitutional functionary towards the Nation to see in

the first instance that the society is freed at the earliest from actual or potential grip of the terrorism round the neck of country, and in the second instance the Nation rests in peace, and harmony without which there is no scope for peace progress and prosperity in the society !.

9. Further still incidentally enough, while going through the record when the accused was arrested, it appears that the Investigating Officer has also made an application for his remand to the police custody for further investigation of the case and the learned Magistrate has summarily rejected the same !!. This is indeed ex-facie quite shocking, shameful, ridiculous, annoying and surprising too ! There indeed cannot be any gross misconduct and perversity on the part of the learned Magistrate to dismiss an application for remand wherein an accused was found in actual conscious and intelligent possession of the muddamal pistol regarding which the police wanted to make further investigation. The reason is that when a person is found with any weapon, two things are possible, firstly either he himself is manufacturing and supplying the arms or he has purchased the same from somebody, meaning thereby there is/are some other link/s in between him and other persons from whom he purchased and/or was to carry forward/transfer such other weapons. Now for both these purposes, unless the accused is taken on remand, the police will never have any idea about the other persons involved in the case, as a result, behind the screen the manufacturers of the weapon and other material links connected with the weapon, crime will go undetected and ultimately not only unpunished but making the society/national security quite exposed and vulnerable to be broken down !!. As a result, other accused persons will be left out, as a further result, investigation will suffer and as a still further result, ultimately it will be the society which will suffer. So not to grant a remand order in a serious cases wherein arms are involved, may be the recovery is of one only, it is too serious a thing for the learned Magistrate to account for and can never be countenanced lightly. There cannot be any greater misconduct on the part of the learned Magistrate than to shut his eyes to the reality. " One can quite understand a person who is blind not able to see, but there cannot be any greater blindness on the part of any person who has got eyes and yet refuses to see." The terrorism in Punjab, Jammu and Kashmir and Assam , can we ignore what is happening there and in other parts of the country ? The terrorism which has taken and is continuously taking heavy toll of the

country, why these things happen ? Obviously because in some given case quite indiscreet and irresponsible view taken by some court dealing with the arms case not remanding and then lightly acquitting the accused !!. What we do not know that had indeed the remand was given in this case, whole racket of manufacturing and/or supplying arms would have been unearthed, exposed and busted !. Once again if the accused found in actual conscious and intelligent possession or reasonably suspected connected with the fire-arms, are immediately remanded to the police custody for further interrogations investigation (for seven to ten days, and in a given case, for more time,) then what is wrong in it ? The society has an unquestionable right to be protected and accordingly when the social security warrants it, how can a Court be oblivious of this material requirement of the society ? To- be touchy and hyper-sensitive for the liberty of an individual accused and wooden-rather no concern whatsoever for the society ? Because the accused is represented by well-paid vociferous advocate and the State/society many a times practically unrepresented because of the uncared, weak or unready public prosecutor ? Should the trial court under the circumstances helplessly keep its conscience subdued not allowing it to speak about the truth and justice standing by the society ? Is this a balanced judicial approach ? In such grave matters "public interest jurisprudence" and the much needed judicial activism warrants that to act on the safer side little stricter and pragmatic view is required to be taken. In this view of the matter, in every case, wherein arms are involved and the police makes an application for remand, no Magistrate shall summarily dismiss it without giving detailed reasons unless of course ultimately prepared for being taken a serious view of the matter against them as an unbecoming conduct if the order is found to be patently perverse.

10. This Court on going through the evidence of p.w. 4, 5 and 6 is more than satisfied rather convinced that the prosecution has brought home the charge against the accused beyond any shadow of doubt. While appreciating the evidence, the Court is required to take a hard stock of the situation prevailing in the society and in the country and must take the pragmatic, realistic view. Further, when the arms are recovered from a person from a border area like Kutch or some coastal area like Porbandar, or from the vulnerable riot stricken areas , infact because of the fast transportation from anywhere, the Court can not take it that lightly and if it takes lightly, it means that it has no worldly knowledge qualifying enough to be a Judge or Magistrate of the

Court.

11. Mr. A.J.Shastri, the learned advocate appearing for the respondent-accused at this stage submitted that this is an acquittal appeal and unless it is pointed out by the learned APP that the view taken by the trial court is perverse, this court can not interfere. This submission of Mr.Shastri has no substance because when there is nothing taken out from the cross-examination of the police witnesses alleging that they have falsely implicated the accused and yet ignoring that if the acquittal is recorded, what else it is than the absolute perversity ?

12. In view of the aforesaid discussion, there is indeed no alternative left with this court but to allow this appeal, and record order of conviction against accused under section 25 (1-B) of the Arms Act.

13. This takes me now to the next important question, namely what ought to be the proper sentence. On perusing the papers, it appears that the respondent has committed an offence punishable under section 25 (1-B) of the Arms Act, 1959 which is in respect of contravention of section 3 of the Act for which the punishment provided is, not to be less than one year, but which may extend to three years and shall also be liable to fine. Ordinarily, while passing the order of sentence, the Court is required to hear the accused. But taking into consideration the fact that when statute has provided the minimum, and especially further when the accused is ultimately going to be sent to jail for one month and fine of Rs.500/- only, it is indeed not necessary to issue a notice to the accused on the point of sentence. Mr. Shastri, learned advocate appearing for the respondent accused submitted that the alleged offence took place on 10th May, 1987 and thereafter, more than nine years have passed. In this view of the matter, this Court should not take a stricter view but impose a sentence of fine only, not imposing a substantial sentence of imprisonment. No doubt, more than nine years have passed and the learned A.P.P. has not placed on record any material showing that after the alleged offence, the accused has committed any other offence. In this view of the matter, though sitting as a trial Judge, this Court would not have hesitated in imposing a sentence of about two years, however, in view of such passage of time of about nine years, the ends of justice would squarely meet if the respondent is sentenced to one month's rigorous imprisonment and fine of Rs. 500/-, in default, to undergo further rigorous imprisonment for

15 days. Even if an accused is ultimately found to be merely a 'carrier' and 'poor' - these circumstances also can not be permitted to dilute the gravity and the seriousness of offence !! The reason is worry and anxiety for the overall safety of the society. The further reason is but for the carriers, it is indeed not possible to smuggle in and distribute, sell and transfer weapons. Accordingly, even if the accused is found with only one fire-arm, it can not be taken lightly. The further reason once again is how much Potassium Cyanide is required to bring about an end to life ? How much fire anyone requires to spark- off to set ablaze explosive surrounding ? Thus, it is the potency and gravity of the crime which must always be alive to the court while ultimately granting the remand and/or sentencing the accused .

14. In more often than not prescribing the elaborate guidelines in judgment, my entire endeavour has been to make in the first instance the law enforcing agency to be aware, alert, efficient and accountable and for that purpose circumspect and careful rather discreet in discharging its statutory duties affecting the overall public interest involved in the second instance to impart judicial awareness and responsibility to the courts, which many a times are found to be conspicuously absent being mislead and wandering away bringing about the serious miscarriage of justice ! Not only that but there is yet one more important aspect rather the third instance, namely the public interest, as to why this court has often thought it advisable to give some guidelines even at the cost of being, becoming little prolix in the judgment. In judicial proceedings at the grass-root level , we all know that before the trial court there are two contesting parties. In civil cases, plaintiff and defendant. In criminal cases, prosecution and the accused. After the trial proceedings are over before the court, the party which loses obviously , challenges the impugned judgment and order before the immediate superior court. Accordingly, when still further superior court is called upon to hear and decide the case, there are over and above two litigating parties the trial court is also there as a third party in the matter of how it appreciated the evidence, interpreted law and conducted itself in dispensing the justice. Accordingly, when the case ultimately comes before the High court-the Constitutional functionary, over and above three dimensions of the case viz. two parties and third trial court, there is still one more dimension, namely, in the fourth instance 'public interest' which can never be permitted to be lost sight off save and except at the

grave risk and prejudice of such 'public interest', and the last but certainly not the least those in the fifth instance are fresh recruits to the judiciary and junior members of the Bar who have just stepped in began their career and gaining experience ! Accordingly, while deciding the cases at the appellate, revisional or original stage, over and above two or three dimensions, the dimension of the 'public interest' and junior members of the Bar and Judiciary can never be allowed to be lost sight of !. Accordingly, apart from reflecting upon the merits of the particular case at hand, whenever and wherever necessary High court diagnosing and spotting out the recurring chronic disease failing the ultimate public interest and the cause of justice, must suitably prescribe the preventive long term medicine also !. If High court will not do it, who else is going to do ? Infact, the High Court Judge is under the Constitutional obligation to exercise power of superintendence and while doing this, it has got to carve out and enlighten the path whereby overall care of the public interest is taken. Rather, with a view to effectively implement guidelines prescribed, a judgment itself must contain a catch where officers directed to comply if does not comply can be held personally accountable. This is absolutely necessary in overall public interest because of in some given cases of failing standards in appreciation of evidence and public duty by the trial courts and Government administration respectively . This must 'judicial activism' rather a 'Judicial Duty' in my opinion is the mandate of the Holy Constitution of India to protect and uphold law and the Constitution, for which every Judge has taken an oath !

15. At this stage, Mr. Shastri, learned advocate for the respondent-accused seeks time to surrender for six weeks. Time is granted.

16. The Registrar is directed to immediately send a copy of this judgment to (1) the Secretary, Home Department; (2) Secretary, Legal Department, Government of Gujarat, Gandhinagar; (3) Director General of Police, State of Gujarat, Ahmedabad, impressing upon them to (i) immediately issue circulars to all the Public Prosecutors and police officers of the State to invariably cite this judgment before the concerned courts where arms are involved; (ii) to ask for the remand in each and every case; (iii) where in the first instance at the time of police asking for the remand of the accused and thereafter in the second instance at the end of trial at the time of arguments; and (4) The Director, Judicial Academy, Gujarat State, Ahmedabad, for information .(5)

Government Pleader, High Court, to circulate the copy of this judgment to each one of the A.PPs.

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JOSHI